



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 228 and 252**

**[Docket DARS-2018-0049]**

**RIN 0750-AJ98**

**Defense Federal Acquisition Regulation Supplement: Repeal of DFARS Provision "Bonds or Other Security" (DFARS Case 2018-D036)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove a provision that is no longer necessary.

**DATES:** Effective **[Insert date of publication in the FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Moore, telephone 571-372-6093.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is amending the DFARS to remove DFARS provision 252.228-7004, Bonds or Other Security, and the associated clause prescription at DFARS 228.170. The Miller Act (40 U.S.C. 3131 to 3134) requires contractors on certain construction contracts

to post bonds that guarantee performance of the contract and payment to subcontractors and suppliers. Several Federal Acquisition Regulation (FAR) clauses are available to implement these requirements on construction contracts. While the guarantees of the Miller Act do not apply to contracts for demolition, dismantling, or removal of improvements, FAR 37.302 permits the contracting officer to require a performance bond or other security, in accordance with FAR 28.103, on such contracts when it is necessary to ensure completion of the work or protect property or payment of suppliers.

For DoD, when performance bonds or other securities are necessary for contracts that involve dismantling, demolition, or removal of improvements, this DFARS provision is included in the solicitation. The provision requires offerors to furnish a bid guarantee with their offer; advises that, upon notice of award, the successful offeror shall provide the Government with the performance bond and any payment due within a set timeframe; and, identifies the acceptable sureties that can be used to support the bond.

In reviewing existing FAR provisions and clauses, it was determined that FAR clause 52.228-16, Performance and Payment Bonds—Other than Construction, and FAR provision 52.228-1, Bid Guarantee, provide the information contained in the DFARS provision and can be included in solicitations and contracts

that involve dismantling, demolition, or removal of improvements. The FAR clause ensures completion of the work; protects property associated with the contract effort; requires the offeror to furnish a performance bond within a set amount of time after receiving a notice of award; and, specifies that bonds must be supported by specific sureties. The FAR provision requires offerors to provide a bid guarantee prior to the opening of bids; includes the form and amount of the guarantee to be provided; advises that a resultant contract may be terminated for failure to provide an executed bond after contract award; and, states that the bid guarantee will be used to offset cost in the event of a termination for default. Since the FAR provision and clause can be used to provide the same information included in DFARS provision, this DFARS provision is no longer necessary and can be removed.

The removal of this DFARS provision supports a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda," which established a Federal policy "to alleviate unnecessary regulatory burdens" on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory

Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the *Federal Register* at 82 FR 35741 on August 1, 2017, and requested public input. No public comments were received on this provision. The DoD Task Force reviewed the requirements of DFARS provision 252.228-7004, Bonds and Other Security, and determined that the DFARS coverage was unnecessary and recommended removal.

## **II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This rule only removes obsolete DFARS provision 252.228-7004, Bonds or Other Security. Therefore, the rule does not impose any new requirements on contracts at or below the simplified acquisition threshold and for commercial items, including commercially available off-the-shelf items.

## **III. Publication of This Final Rule for Public Comment Is Not Required by Statute**

The statute that applies to the publication of the FAR is Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a

significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a new regulation; rather, this rule merely removes an obsolete requirement from the DFARS.

#### **IV. Executive Orders 12866 and 13563**

E.O. 12866, Regulatory Planning and Review, and E.O. 13563, Improving Regulation and Regulatory Review, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget, Office of Information and Regulatory Affairs, has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

#### **V. Executive Order 13771**

This rule is not an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

#### **VI. Regulatory Flexibility Act**

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

#### **VII. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Parts 228 and 252**

Government procurement.

**Jennifer Lee Hawes,**

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 228 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 228 and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 228-BONDS AND INSURANCE**

**228.170 [Removed]**

2. Remove section 228.170.

**PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

**252.228-7004 [Removed and Reserved]**

3. Remove and reserve section 252.228-7004.

[FR Doc. 2018-23679 Filed: 10/30/2018 8:45 am; Publication Date: 10/31/2018]